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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN AND LYCOMING TRUST COMPANY, TRUSTEE,

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. 599

CARL F. STROEHMANN AND LYCOMING TRUST COMPANY, TRUSTEE,

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Charles Evan Hughes, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

The petition of Carl F. Stroehmann and Lycoming Trust Company, Trustee, petitioners (appellees below), respectfully prays that a writ of certiorari issue to the Circuit Court of Appeals for the Third Circuit to review the decree of that Court entered on October 6, 1936 (R. 179), reversing the decree of the District Court of the United States for

the Middle District of Pennsylvania entered on July 2, 1935 (R. 158), which dismissed without leave to amend the amended bill of complaint in which the respondent sought to cancel the disability benefits of certain policies of life insurance issued by the respondent because of alleged fraudulent representations in the applications therefor.

Statement of the Case.

The case having been heard upon a motion to dismiss the amended bill of complaint (R. 153-157), all of the facts appear in the amended bill (R. 3, R. 153).

The respondent, Mutual Life Insurance Company of New York, issued to Carl F. Stroehmann three policies of life insurance containing disability benefits on the following dates and in consideration of the following premiums:

No. 1.—On Sept. 20, 1919, Policy No. 2,646,105—face value $5,000—annual premium $112.50 including $4.50 for disability benefits. (Exhibit D of amended bill R. 33-70).

No. 2—On Dec. 9, 1919, Policy No. 2,677,078—face value, $5,000—annual premium $112.50 including $4.50 for disability benefits. (Exhibit E of amended bill R. 70-107).

No. 3—On June 30, 1930, Policy No. 4,361,192—face value $40,000—annual premium $1,370.00 including $238.00 for disability benefits (Exhibit G of amended Bill R. 118-152).

For convenience of reference, we shall hereinafter refer to these several policies as Nos. 1, 2 and 3, respectively.

The beneficiary of each of said policies was ultimately changed to Lycoming Trust Company, Trustee (R. 68, R. 105, R. 152).

Policies Nos. 1 and 2 were both issued upon a single written application and written declarations made to the medical examiner (in continuation of said application) and dated September 15, 1919, a copy of which was attached to each of these two policies (See Exhibit D, R. 60-67, and Exhibit E, R. 97-104, attached to the amended bill). No question is raised concerning the truth of any of the statements made in this application. Both of these policies contained on their third page provisions for "Benefits in the event of total and permanent disability before age 60."

On February 9, 1928, Stroehmann signed separate requests asking that each of these two policies be amended so as to cancel the old, and substitute new, disability provisions therein. These requests are Exhibits A and B attached to the amended bill of complaint (R. 20-23). In connection with these requests a single written application with written declarations to the company's medical examiner in continuation of said application was made. A copy of this application is attached to the amended bill as Exhibit C (R. 23-33).

Copies of these requests and of the application were not attached to the policies.

In accordance with these requests and relying on the application, the respondent on February 23, 1928 cancelled the original disability provisions in Policies Nos. 1 and 2 (R. 69, R. 106) and added to and made part of each policy provisions for "Increasing Disability Benefits" (R. 55-60; R. 92-97).

Policy No. 3 (Exhibit G, R. 118-152) was issued on June 30, 1930 upon a written application and written declarations to the medical examiner made in continuation of said application by Stroehmann at Norristown, Pennsylvania. A copy of this application and declarations to the medical examiner was attached to and made part of the policy (Exhibit F, R. 108-118).

On October 11, 1932, respondent filed its Bill of Complaint and sought therein to cancel—

(a) The "Increasing Disability Benefits" provisions attached to and made part of Policies Nos. 1 and 2 in accordance with the requests and applications hereinbefore referred to;

(b) The disability benefit provisions of Policy No. 3.

The basis on which this cancellation was sought was that insured had made certain alleged fraudulent misrepresentations with respect to medical attendance and illness in the applications therefor.

On May 17, 1934, the District Court for the Middle District of Pennsylvania, in an opinion written by Hon. Albert W. Watson, denied petitioner's motion to dismiss the bill of complaint and directed your petitioners to answer (R. 160-168), which your petitioners did.

On April 18, 1935, respondent having been granted leave to amend its bill so as to include additional alleged misrepresentations discovered since filing its original bill, amended its bill.

On May 16, 1935, your petitioners filed a motion to dismiss the amended bill of complaint (R. 153-157), which in substance was based on the following reasons:

(1) Respondent had an adequate remedy at law by way of defense to an action to recover for disability benefits.

(2) The Amended Bill of Complaint showed upon its face that the plaintiff had no cause of action against the defendant for the reason that—

(a) Policies Nos. 1 and 2 contained the following provision:

> "This policy shall be incontestable after two years from its date of issue except for non-payment of premiums" (R. 39, R. 76).

The "Increasing Disability Benefits" provisions sought to be cancelled by reason of alleged misrepresentations as to medical attendance and illness made in the application therefor were attached to and made a part of Policies Nos. 1 and 2 on February 23, 1928. The incontestable clause contained in Policies Nos. 1 and 2 began to run anew from the date of the amendment of the policies on February 23, 1928 and at the time of filing of the bill on October 11, 1932, the contestable period provided for in Policies Nos. 1 and 2 had expired and hence, they could not be contested on the ground of alleged misrepresentations made in the application for such amendment.

(b) The requests (Exhibits A and B, R. 20-23) for the change in disability benefits in Policies Nos. 1 and 2 and the application therefor (Exhibit C, R. 23-33) were not attached to and made part of Policies Nos. 1 and 2, in compliance with the *Pennsylvania Statute of May* 17, 1921, P. L. 682, Art. III, Sec. 318 (40 Purdon's Penna. Statutes, Sec. 441) and hence, the "Increasing Disability Benefits" attached to Policies Nos. 1 and 2 cannot be cancelled by reason of any agreements or alleged misrepresentations made therein.

(c) Policy No. 3 contained the following provision:

> "INCONTESTABILITY.—Except for non-payment of premiums and except for the restrictions and provisions applying to the double indemnity and disability benefits as provided in sections 1 and 3, respectively, this policy shall be incontestable after one year from its date of issue unless the insured die in such year, in which event it shall be incontestable after two years from its date of issue."

Policy No. 3 was issued June 30, 1930 and it appearing from the face of the amended bill that insured lived for more than one year from the date of issue of the policy, the policy became incontestable on June 30, 1931.

On October 11, 1932 after the expiration of the contestable period the bill was filed. As the bill did not contest the policy by reason of non-payment of premiums, nor by reason of any restriction or provision applying to the double indemnity and disability benefits as provided in Sections 1 and 3 of the policy, no contest on the ground of alleged misrepresentations in the application can be made since such contest was not excepted from the operation of the incontestable clause.

On July 2, 1935 the District Court, on authority of *Mutual Life Ins. Co. of New York* v. *Markowitz, et al.*, 78 F. (2d) 396, certiorari denied (296 U. S. 625), a decision of the Circuit Court of Appeals for the Ninth Circuit, and *Ness* v. *Mutual Life Ins. Co.*, 70 F. (2d) 59, a decision of the Circuit Court of Appeals of the Fourth Circuit, dismissed the bill without leave to amend.

On September 6, 1935, respondent appealed to the Circuit Court of Appeals for the Third Circuit and on October 6, 1936 that Court reversed the decree of the district court dismissing the bill and remanded the case for further proceedings.

Rulings of the Court Below.

The Circuit Court in its opinion reversing the decree of the District Court dismissing the amended bill, held that,—

(1) with respect to Policies Nos. 1 and 2:

(a) While the application for the "Increasing Disability Benefits," not having been attached to Policies Nos. 1 or 2, was, by reason of Secs. 318 and 410 (d) of the Insurance Code of Pennsylvania of May 17, 1921, P. L. 682 (40 Purdon's Penna. Statutes Annotated, Secs. 441 and 510) inadmissable in evidence to show fraudulent representations therein, such representations could be shown by parol evidence thereof.

(b) respondent reserved the defense of fraud in the requests for "Increasing Disability Benefits" notwith-

standing the fact that such requests were not attached to the policy and the policy provided that the policy and the application constituted the entire contract.

(2) with respect to Policy No. 3:

(a) that the incontestability clause permitted a contest of the disability benefit provisions on the ground of fraudulent misrepresentations in the application even though such contest is not included in the restrictions and provisions respecting disability as provided in Sections 1 and 3 of the policy.

From this decree this petition for certiorari is prosecuted.

Questions Presented.

1. Whether the insured not having died within one year from the date of issue of the policy, the insurer may contest, after the expiration of a year from the date of issuance of the policy, the disability provisions of a life insurance policy on the ground of alleged fraudulent misrepresentations in the application therefor where the incontestable clause contained in the policy provides—

> "Except for non-payment of premiums and except for the restrictions and provisions applying to the double indemnity and disability benefits as provided in sections 1 and 3 respectively, this policy shall be incontestable after one year from its date of issue unless the insured dies in such year, in which event it shall be incontestable after two years from its date of issue,"

and fraudulent misrepresentations in the application are not among the restrictions and provisions contained in sections 1 and 3 of said policy?

2. Whether the incontestable clause in a life insurance policy begins to run anew from the date of a supplemental

application for a change in disability benefits provided in such policy with respect to the representations made in such supplemental application?

3. Whether alleged fraudulent misrepresentations in an application for changes in the disability benefits of a life insurance policy can be proved by parol evidence when the application itself is inadmissable because not attached to the policy and because Sec. 318 of the *Pennsylvania Insurance Code of May* 17, 1921, P. L. 682, at 701 (40 *Purdon's Penna. Statutes Annotated,* Sec. 441) provides that when an application is not attached to a policy it shall not be received in evidence or considered a part of the contract?

4. Whether alleged fraudulent misrepresentations in an application for changes in the disability benefits of a life insurance policy can be proved by parol evidence when the application itself is inadmissable because not attached to the policy and the policy expressly provides that no statement in the application shall be used to avoid the policy unless the application is attached to the policy?

5. Whether a reservation of the defense of fraudulent statements in the request for changes in the disability benefits contained in a life insurance policy can be taken advantage of when such reservation is not attached to and made part of the policy and the policy expressly provides that the policy and the application attached thereto constitute the entire contract between the parties?

Reasons Relied on for the Allowance of the Writ.

A.

The decision in this case by the Circuit Court of Appeals for the Third Circuit is in irreconcilable conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the cases of *Ness* v. *Mutual Life Insurance Company of New York,* 70 F. (2d) 59, and *New York Life Insurance Company* v. *Truesdale,* 79 F. (2d) 481,

and with the decision of the United States Circuit Court of Appeals for the Ninth Circuit in the cases of *Mutual Life Insurance Company of New York* v. *Markowitz*, 78 F. (2d) 396 (certiorari denied 296 U. S. 625) and *New York Life Insurance Company* v. *Kaufman*, 78 F. (2d) 398 (certiorari denied 296 U. S. 626).

Policy No. 3 issued by respondent to your petitioner, Carl F. Stroehmann, contained the following incontestable clause:

> "Incontestability.—Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue."

This incontestable clause is identical in language with that contained in the policy issued by the respondent in this case and involved in the cases of *Mutual Life Ins. Co. of N. Y.* v. *Ness*, 70 F. (2d) 59, and *Mutual Life Ins. Co. of N. Y.* v. *Markowitz*, 78 F. (2d) 396, certiorari denied 296 U. S. 625.

The United States Circuit Court of Appeals for the Fourth Circuit in the *Ness* case (*supra*) and for the Ninth Circuit in the *Markowitz* case (*supra*) both held that the incontestability clause quoted above precluded the respondent from asserting after the expiration of the incontestable period that the disability benefits were fraudulently procured and held that fraudulent representations in the application was not one of the provisions and restrictions contained in Sections 1 and 3 of the policy which respondent preserved by the exception in the incontestable clause.

The Third Circuit in this case declined to follow the *Ness* and *Markowitz* cases (*supra*) and came to a contrary conclusion.

The question has never been raised in, or decided by, the Supreme Court of Pennsylvania.

The Circuit Court in this case referred in its decision and relied upon its decision in *New York Life Ins. Co.* v. *Gatti* and *New York Life Ins. Co.* v. *Ruhlin,* decided the same day as the *Stroehmann* case but not yet reported. For the convenience of this Court, the relevant portion of the opinion in the *Gatti* and *Ruhlin* cases is set forth in the Appendix hereto. The Circuit Court concedes (Appendix page 33) that there is a conflict in the authorities, particularly with the *Ness* and *Markowitz* cases (*supra*) but declines to follow those cases.

B.

The Circuit Court refused to dismiss the amended bill as to Policies Nos. 1 and 2 and ruled (R. 178) that notwithstanding that *Sec.* 318 *of Art. III and Sec.* 410 (*d*) *of Article IV of the Pennsylvania Insurance Code of May* 17, 1921, P. L. 682, at 701 and 721 (40 Purdon's Penna. Statutes Annotated, Secs. 441 and 410) prohibited the proof of fraudulent statements in the application for the "Increasing Disability Benefits" contained in said policies by offering in evidence the application therefor, which had not been attached to said policies, the respondent could prove such statements at trial by other methods (*i. e.*, parol evidence of the same being made).

This ruling is a decision on an important question of general law and untenable because—

(a) In conflict with the express provision of Policies Nos. 1 and No. 2 which provide (R. 39 and R. 77) that no statement of the Insured shall avoid the policy unless contained in the written application attached to or endorsed on the policy. The application for "Increasing Disability Benefits" contained in Policies Nos. 1 and 2 not having been attached thereto, no statement therein can be used to avoid the policy;

(b) In conflict with the weight of authority which holds that where an application is inadmissable the contents thereof also are inadmissable and not subject to proof by parol evidence. *Couch-Cyclopedia of Insurance Law* Vol. 1, Sec. 138, page 274; *Cooley's Brief on Insurance* (Second Edition), Vol. 2, page 1092;

(c) In conflict with the settled construction of *Sec.* 318 *of the Insurance Code of Pennsylvania* as construed by the Supreme Court of Pennsylvania. In *Fidelity Title & Trust Co.* v. *Illinois Life Ins. Co.*, 213 Pa. 415 and *Fidelity Title & Trust Co.* v. *Metropolitan Life Ins. Co.*, 305 Pa. 296 the Supreme Court of Pennsylvania held that the *Act of May* 11, 1881, *P. L.* 20, which is re-enacted by *Sec.* 318 *of the Insurance Code of Pennsylvania,* not only makes an application, not attached to a policy, inadmissable in evidence to prove fraudulent statements made therein but also makes parol evidence or other proof of such statements inadmissible.

C.

The Circuit Court ruled (R. 176) that respondent had expressly reserved the defense of fraud by a provision in the requests for changes in disability benefits, notwithstanding the fact that these requests were not attached to, nor made part of either Policies Nos. 1 or 2. This ruling is a decision on an important question of general law and untenable because—

(a) It is in conflict with the express provisions of Policies Nos. 1 and 2 and with the weight of authority. Both policies provide that the policy and application therefor constitute the entire contract. The ruling of the Circuit Court that respondent had reserved in the requests for changes in disability benefits the defense of fraud is in direct conflict with these express provisions. Not only is it in direct conflict with these express provisions but it is contrary to the

weight of authority and the elementary proposition of law that whatever is intended to be made a part of a written contract of insurance should be inserted in the policy or incorporated therein by reference. *Couch Cyclopedia of Insurance Law*, Vol. 1, Sec. 134, page 260;

(b) Such ruling is in direct conflict with the settled construction of *Sec. 318 of the Insurance Code of Pennsylvania* (40 Purdon's Penna. Statutes Annotated Sec. 441); *Fidelity Title & Trust Co. v. Metropolitan Life Insurance Co.*, 305 Pa. 296;

(c) The contestable period provided for in both Policies Nos. 1 and 2 had expired and the insurer is estopped thereby from raising the defense of fraud. The incontestable clause contained in Policies Nos. 1 and 2, as to statements in the application for the "Increasing Disability Benefits" attached to said policies, began to run anew from the date of the attaching of such provisions.

D.

While the order of the Circuit Court remands the case for trial, since the legal questions raised dispose of the whole controversy before the court, the writ should be allowed without further protracting the litigation to the extent necessary to reach a final decree.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Third Circuit, should be granted.

CARL F. STROEHMANN AND
LYCOMING TRUST COMPANY, Trustee,
By GEORGE H. HAFER,
GEO. ROSS HULL,
CARL B. SHELLEY,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The first opinion of the District Court refusing petitioners' motion to dismiss the bill is reported in 6 F. Supp. 953. The second opinion of the district court reversing its first opinion on authority of *Ness.* v. *Mutual Life Ins. Co. of N. Y.*, 70 F. (2d) 59 and *Mutual Life Ins. Co. of N. Y.* v. *Markowitz*, 78 F. (2d) 396, certiorari denied 296 U. S. 625, is not yet reported but is found at pages 158-159 of the record. The opinion of the Circuit Court of Appeals reversing this opinion is not yet reported but is found at pages 174-179 of this record.

The relevant portion of the opinion of the Circuit Court of Appeals in the case of *New York Life Ins. Co.* v. *Gatti* and *New York Life Ins. Co.* v. *Ruhlin*, decided by the Circuit Court of Appeals for the Third Circuit on the same day as the *Stroehmann* case and relied on in the *Stroehmann* case, is not yet reported but is printed in the appendix hereto.

II.

Jurisdiction.

The jurisdiction of this court is invoked under *Sec.* 240 (*a*) *of the Judicial Code*, as amended by the *Act of Feb.* 13, 1925 (43 Stats. 938; U. S. C. A. Section 347, page 359).

The date of the decree of the Circuit Court of Appeals now sought to be reviewed is October 6, 1936 (R. 180).

III.

Statement of the Case.

The essential facts of the case are fully set forth in the accompanying petition for certiorari (Petition, page 2) and in the interest of brevity, are not repeated here.

IV.

Specification of Errors.

(a) The Circuit Court of Appeals erred in reversing the decree of the District Court dismissing the bill and remanding the case to the District Court for trial.

(b) The Circuit Court of Appeals erred in holding (R. 178-179) that the expiration of the period provided for in the incontestable clause in Policy No. 3 did not preclude the respondent from contesting the validity of the disability provisions contained therein on the ground of fraud in the procurement thereof.

(c) The Circuit Court of Appeals erred in holding (R. 177-178) that fraudulent statements in the application for "Increasing Disability Benefits" contained in Policies Nos. 1 and 2, may be proved by parol evidence, although the application itself was inadmissible to prove such fraudulent statements by reason of *Sec.* 318 *of Art. III of the Insurance Code of Pennsylvania of May* 17, 1921, P. L. 682, 701 (40 Purdon's Penna. Statutes Annotated, Sec. 441) and the fact that the application therefor was not attached to either policy.

(d) The Circuit Court of Appeals erred in holding (R. 176) that the respondent had expressly reserved in the requests for changes in the disability benefits, which were not attached to Policies Nos. 1 and 2, the defense of fraud in the application for such changes.

(e) The Circuit Court of Appeals erred in not holding that, as to statements in the application for "Increasing Disability Benefits" contained in Policies Nos. 1 and 2, the incontestable clause began to operate anew from the date of such application, and, having expired, prevented a contest

on the ground of alleged fraudulent statements contained therein.

V.

ARGUMENT.

I.

The decisions of the United States Circuit Courts of Appeal for the Fourth and Ninth Circuit are in irreconcilable conflict with that of the Third Circuit in this case with respect to the construction of the incontestability clause contained in Policy No. 3 and the Pennsylvania Supreme Court has not passed on the question.

That there is this conflict in the decisions of the various Circuit Courts of Appeal and that the Circuit Court in this case concedes such conflict, clearly appears from the discussion set forth under Reason "A" of the "Reasons Relied on for the Allowance of the Writ" (pages 8-12 of the Petition) and in the interest of brevity is not repeated here.

II.

The ruling of the Circuit Court that notwithstanding the fact that by reason of Sec. 318 of the Pennsylvania Insurance Code of May 17, 1921, P. L. 682, 701 (40 Purdon's Penna. Statutes Annotated, Sec. 441), the application for "Increasing Disability Benefits," not having been attached to Policies Nos. 1 and 2, was inadmissible in evidence to prove fraudulent statements therein, the respondent could show by parol testimony that such fraudulent statements were made, is

(a) *a decision on an important question of general law which is untenable, in conflict with weight of authority, and contrary to the express provisions of the policies;*

(b) *in conflict with the settled construction of the Supreme Court of Pennsylvania of Sec.* 318 *of the Pennsyl-*

vania Insurance Code of May 17, 1921, P. L. 682, 701 (40 *Purdon's Penna. Statutes Annotated, Sec.* 441).

Policies Nos. 1 and 2 were issued to Carl F. Strochmann, the insured, on September 20, 1919, and December 9, 1919, and copies of these policies are attached to the Amended Bill of Complaint and marked Exhibits D and E (R. 33-70 and R. 70-107).

No question is raised in the amended bill of complaint concerning the truth of any of the statements made in the applications for these policies as issued on September 20, 1919 and December 9, 1919.

On February 9, 1928, insured signed separate requests for change in the disability benefits of each of said policies. These requests are attached to the amended bill and marked Exhibits A and B, respectively (R. 20, R. 21). *They were not attached to or made part of the policy.*

In connection with these requests a single written application and declarations to the medical examiner in continuation thereof was made by the insured on February 11, 1928, at Williamsport, Pennsylvania. A copy of this application is attached to the amended bill and marked Exhibit C (R. 23-33).

A copy of this application was not attached to nor made part of either Policy No. 1 or Policy No. 2.

Pursuant to the above requests and application, the respondent on February 23, 1928, cancelled the disability benefit provisions as contained in Policies Nos. 1 and 2, when issued in 1919, and attached to each of said policies, provisions for "Increasing Disability Benefits" (R. 55-60; R. 92-97).

The amended bill of complaint filed by respondent seeks to cancel these provisions for "Increasing Disability Benefits" on the ground of alleged fraudulent misrepresentations made in the application for such provisions, which

application was not attached to nor made part of Policy No. 1 or Policy No. 2.

The Circuit Court ruled (R. 177-178) that the *Pennsylvania Statute of May* 17, 1921, P. L. 682, Art. III, Sec. 318 and Art. IV, Sec. 410 (d) (40 Purdon's Penna. Statutes Annotated, Sec. 441 and 510) prohibited the respondent from proving fraud by introducing in evidence the application for "Increasing Disability Benefits" which was not attached to or made part of Policies Nos. 1 or 2.

Notwithstanding this ruling, the Court further ruled that although respondent cannot prove fraudulent statements in the application therefor by introducing the application in evidence, it could have the "Increasing Disability Benefits" cancelled and rescinded if it is able to prove the fraudulent statements in the application without placing the application in evidence and therefore, the court refused to dismiss the bill as to Policies Nos. 1 and 2.

(a)

This ruling, that, although alleged fraudulent statements in the application cannot be proved by introducing in evidence the application they can be proved by parol evidence, is untenable, in conflict with the weight of authority and contrary to the express provisions of the policies.

Both Policy No. 1 (R. 39) and Policy No. 2 (R. 77) contained the following provision:

> "The Contract.—This Policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, *and no such statement of the Insured shall avoid or be used in defense to a claim under this Policy unless contained in the written ap-*

plication herefor and a copy of the application is endorsed on or attached to this Policy when issued" (R. 39, R. 77). (Italics ours.)

Accordingly, we submit, that to permit respondent to seek to avoid Policies Nos. 1 and 2 by proof of alleged fraudulent statements in the application therefor, when such application has not been attached to or made a part of either policy, is prohibited by and contrary to the express provisions of the contract between the parties.

Not only does the express provision of the policy prohibit the use of any statement in an application not attached to the policy in order to avoid the policy but the weight of authority is that such use is prohibited.

In *Cooley's Briefs on Insurance* (Second Edition), Vol. 2, page 1092, the following general principle supported by the citation of a great number of authorities (including Pennsylvania) is laid down:

> "The failure of the insurer to comply with the statute not only renders the application itself inadmissible in evidence on its behalf to show misrepresentation by the insured, but parol evidence cannot be admitted to show that insured made false statements therein."

The same principle is stated in *Couch, Cyclopedia of Insurance Law,* Vol. 1, Sec. 138, page 274, where it is said:

> "Many jurisdictions now have statutes which require that the application, or a copy thereof, be annexed to, incorporated in, indorsed on or referred to, in the policy, or that the constitution, by laws, etc., of benefit associations, are a part of the contract between it and a member, or that the contract shall consist of the application, certificate, charter, constitution, by laws, etc. Such statutes when applicable, establish a rule of substantive law which becomes a part of the contract, and, as a consequence, the application must be incorporated in the policy to be a part thereof. *In*

*fact such a statute must be complied with; otherwise the application and all testimony relating thereto will be excluded from evidence in aid of the policy although the statute does not expressly provide that a failure to comply with the requirement shall render the contents of the application inadmissible in evidence. * * * Of course where the application is not admissible its contents cannot be shown by parol evidence * * *.*" (Italics ours.)

Numerous authorities are cited in support of this proposition in Couch, including a great many Pennsylvania cases.

(b)

Not only is the ruling of the Circuit Court contrary to the weight of authority and the express provisions of Policies Nos. 1 and 2 but it is in direct conflict with the settled construction of Sec. 318 of the Pennsylvania Insurance Code of May 17, 1921, P. L. 682, 701 (40 Purdon's Penna. Statutes Annotated, Sec. 441).

The *Pennsylvania Act of May* 11, 1881, P. L. 20, provided:

"That all life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing business therein, which contain any reference to the application of the insured or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence in any controversy between the parties to or interested in, the said policy,

nor shall such application or by-laws be considered a part of the policy or contract between such parties." (Italics ours.)

This act was substantially re-enacted by *Sec.* 318 *of the Pennsylvania Insurance Code of May* 17, 1921, P. L. 682, 701 (40 Purdon's Penna. Statutes Annotated, Sec. 441), which provides:

"All insurance policies, issued by stock or mutual insurance companies or associations doing business in this State, in which the application of the insured, the constitution, by-laws, or other rules of the company form part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application as signed by the applicant or the constitution, by-laws, or other rules referred to; and, unless so attached and accompanying the policy, no such application, constitution, or by-laws, or other rules shall be received in evidence in any controversy between the parties to, or interested in, the policy, nor shall such application, constitution, by-laws, or other rules be considered a part of the policy or contract between such parties."

That the Act of 1921 (*supra*) substantially re-enacts the Act of 1881 (*supra*), see *Fidelity Title & Trust Co.* v. *Metropolitan Life Ins. Co.*, 305 Pa. 296.

Accordingly, the decisions of the Pennsylvania Supreme Court interpreting the Act of 1881 are binding precedents for the construction of the Act of 1921 unless a difference results from a change in the act. With respect to applications for a policy, no such change appears as it does with respect to rules of the company. (See *Sipp* v. *Phila. Life Ins. Co.*, 293 Pa. 292, at 298, pointing out this change as to rules.)

The Pennsylvania Supreme Court in the case of *Fidelity Title and Trust Co.* v. *Illinois Life Ins. Co.*, 213 Pa. 415,

expressly held that where an application which has not been attached to an insurance policy and is therefore in accordance with the Act of 1881 (*supra*) not admissible in evidence, proof of the alleged falsity of statements made therein is also inadmissible. The lower court, after having held that an application for a life insurance policy was inadmissible in evidence by reason of the Act of 1881 because it had not been attached to the policy, refused an offer to show by the oral testimony of the medical examiner that the statements in the application were false. The Supreme Court of Pennsylvania, in affirming this rejection of the offer to prove the falsity of statements in the application where the application itself was inadmissible, said (213 Pa. at 426):

> "This offer conflicts directly with the Act of May 11, 1881, P. L. 20, relating to life and fire insurance policies. It is there provided that the application shall not be considered a part of the policy or contract between the parties, unless a correct copy of such application be attached to the policy, and the application in this case was not attached. In the affidavit of defense it was admitted that a written application had been made, in which the very thing here proposed to be shown was inquired of, and written answers in response obtained from the insured. It is to make the act of no effect, to say that it excludes the paper being considered a part of the contract between the parties, but allows proof of what it contains for that very purpose; not only so, but it reverses the established order of proof that always regards the written document as the first and best evidence of the contract, and excludes all other until the writing be introduced, or its absence accounted for. There was no error in the rejection of the evidence."

The Supreme Court of Pennsylvania in the recent case of *Fidelity Title & Trust Co.* v. *Metropolitan Life Ins. Co.*, 305

Pa. 296 (1931), followed the *Illinois Life Ins. Co.* case from which we have quoted above.

The Circuit Court declined to follow the *Illinois Life Ins. Co.* case (*supra*). On authority of *Gordon, Secretary of Banking* v. *Continental Casualty Co.*, 311 Pa. 109, the Circuit Court held that if respondent could prove the alleged false statements in the application without offering in evidence the application, it may do so and on this basis, refused to dismiss the bill as to Policies Nos. 1 and 2.

It is true that the Pennsylvania Supreme Court did say there (311 Pa. at 113):

> "If it be thought that the first part which says that 'No statement made in the application for this bond or otherwise * * *' should operate to exclude the entire section from consideration, because the application was not attached to the policy, it would suffice to say, in the first instance, that section 318 of 'The Insurance Company Law of 1921,' which deals with this subject, does not exclude proof of the fact, but only excludes its proof by the application itself, if not attached to the policy. Whether or not the fact can be otherwise proved, will be known when the case is tried in due course. If, in applying for the bond, the statement as to the honesty of the employees, whose fidelity was to be insured, was 'otherwise submitted' to defendant, than in the application for the bond, and its inaccuracy is proved on the trial, the misstatement thus made may be a complete defense to this suit on the bond."

We submit that the decision of the Supreme Court of Pennsylvania in no way affects the authority of the *Illinois Life* case (213 Pa. 415) and the *Metropolitan* case (305 Pa. 296) because—

(a) the court also said in its opinion (311 Pa. at 112):

> "Plaintiff moved for judgment for want of a sufficient affidavit of defense, which the court below made

absolute, because, under Section 318 of 'The Insurance Company Law of 1921,' P. L. 682, 701, the application was not admissible in evidence or to be considered a part of the contract, even on a rule for a summary judgment, because it had not been attached to the bond when it was issued by defendant. *Whether or not this conclusion was correct was the subject of much contention here, but we will not decide the point at this time;"* (Italics ours.)

(b) the court in the *Continental Casualty* case had before it a bond which said "No statement made in the application for this bond *or otherwise"* (see extract *supra*) and was passing on this language and not the Act of 1881 alone; and

(c) the Supreme Court of Pennsylvania when this same case was again before it held that the Act of 1881 had no application to the case because the case involved a bond and the Act of 1881 does not include bonds. *Gordon, Secretary of Banking* v. *Continental Casualty Company*, 319 Pa. 555.

Accordingly, it is clear that what was said in the *Continental Casualty* case in 311 Pa. 113 is *dictum* and should not be followed in view of the applicable decisions in the cases of *Illinois Life Ins. Co.* (213 Pa. 415), and *Metropolitan Life Ins. Co.* (305 Pa. 296).

We submit that the Circuit Court on the weight of authority, the express provisions of the contract and the settled construction of the Pennsylvania Insurance Code should have held that where an unattached application is inadmissible to prove alleged fraudulent statements therein, parol evidence to the same effect is inadmissible, and hence, should have dismissed the amended bill as to Policies No. 1 and No. 2.

III.

The ruling of the Circuit Court that respondent had expressly reserved the defense of fraud by a provision in the requests for changes in disability benefits, which requests were not attached to nor made part of either Policy No. 1 or Policy No. 2, is:

(a) *decision on an important question of general law, untenable, in conflict with the weight of authority and contrary to the express provisions of the policy;*

(b) *in direct conflict with the settled construction of Sec.* 318 *of the Pennsylvania Insurance Code of May* 17, 1921, *P. L.* 682 (40 *Purdon's Penna. Statutes Annotated Sec.* 441);

(c) *untenable because the contestable period provided for in both Policies Nos.* 1 *and* 2 *had expired and insurer is estopped thereby from raising the defense of fraud.*

Each of the written requests for changes in disability benefits in Policies Nos. 1 and 2, which were executed by the insured at Williamsport, Pennsylvania, on February 9, 1928 and copies of which appear in the amended bill as Exhibits A and B (R. 20, R. 21), provided, *inter alia* (R. 21 and R. 22):

> "That if the above statements as to occupation or travel or the statements or answers in said medical examination shall be in any respect untrue, or if any Disability Benefits shall be claimed and if it shall appear that disability originated before the date of the granting of this request, any disability benefits granted under said policy shall be only those, if any, provided for in said policy before the change herein requested was made."

The Circuit Court ruled (R. 176) that this provision contained in the requests for changes in the disability benefit

provisions of Policy No. 1 and Policy No. 2 as originally issued reserved the defense of fraud to the insurer.

The provisions contained in the requests for changes in Policy No. 1 and Policy No. 2 were not attached to, nor endorsed on, either Policy No. 1 or Policy No. 2.

Although the above provisions were not attached to nor endorsed on Policies Nos. 1 or 2, the Circuit Court ruled (R. 176) that they reserved the defense of fraud to the insurer.

(a)

Such ruling is untenable being in conflict with the weight of authority and the express provisions of the policies.

Both Policy No. 1 (R. 39) and Policy No. 2 (R. 77) contain the following provision:

> "The Contract.—This policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto."

In the light of this provision, we submit that if the respondent desired to make these provisions part of Policies Nos. 1 and 2, it is Hornbook Law that they should have been attached to, endorsed on or referred to in such policies.

In Couch "Cyclopedia of Insurance Law," Vol. 1, Sec. 134, page 260, the general principle is stated as follows:

> "It is elementary law that whatever is intended to be made part of a written contract of insurance should be inserted in the policy or incorporated therein by attachment and proper words of reference."

(b)

Such ruling is in direct conflict with Sec. 318 of the Pennsylvania Insurance Code of May 17, 1921, P. L. 682, (40 Purdon's Penna. Statutes Annotated, Sec. 441).

We have seen (this brief, page 20) that Sec. 318 of the Insurance Code of Pennsylvania in all particulars relating

to applications for an insurance policy re-enacted the Pennsylvania Act of 1881, P. L. 20.

That under these acts, it is necessary to have the whole application attached to a policy to be considered a part thereof is apparent from the following Pennsylvania cases:

Fisher v. *Fidelity Mutual Ins. Co.*, 181 Pa. 1, 12;

Fid. T. and T. Co. v. *Metropolitan Life Ins. Co.*, 305 Pa. 296.

That the act applies to supplemental applications or amendments to applications clearly appears from the above cases. In *Fid. T. and T. Co.* v. *Metropolitan Life Ins. Co.*, 305 Pa. 296, at 301, the Supreme Court of Pennsylvania said:

> "Even if the 'amendment forms,' by which defendant intended to have the old application apply to this policy, had been signed by Browarsky, it would have been unavailing, since they were not attached thereto. This is squarely ruled in Fisher *v.* Fidelity Mutual Life Association of Phila., 188 Pa. 1, 12, where we said: 'It clearly appeared in evidence that there was a supplemental application which was not attached to or indorsed on the policy. * * * The omission of this from the policy was a failure to comply with the Act of 1881. The act requires that a copy of the entire application—not merely a part thereof,—shall be attached. The omission of a part, which of course includes a supplementary part, operates to exclude the whole. The statute must be interpreted in the spirit in which it was enacted,' that is, 'to produce a uniform rule of procedure' (Hebb *v.* Kittaning Mutual Fire Ins. Co., 138 Pa. 174, 180), 'and its provisions should be strictly enforced': Pickett *v.* Pacific Mutual Life Ins. Co., 144 Pa. 79, 94. The Act of 1881, above referred to, is that of May 11, 1881, P. L. 20, and appellant admits it is substantially re-enacted by section 318 of the Insurance Code of May 17, 1921, P. L. 682, 701, which was in force when this insurance was effected, and therefore, he

says, the 'decisions construing the earlier enactment are applicable to that now in force.' Indeed the Act of 1921 is broader than that of 1881, but the differences are unimportant here."

(c)

Such ruling is untenable. The contestable period provided for in both Policies Nos. 1 and 2 had expired and insurer is estopped thereby from raising the defense of fraud.

Both Policy No. 1 (R. 39) and Policy No. 2 (R. 76) contain the following clause:

> "Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premiums" (R. 39, R. 76).

The amended bill seeks to cancel the "Increasing Disability Benefits" on the ground of fraudulent statements in the application for such benefits. At the time such benefits were applied for and attached to Policy No. 1 and Policy No. 2, the contestable period for the original application had long since expired.

We submit that this period began to run anew as to statements in the application for "Increasing Disability Benefits" and since the contestable period had also expired as to such statements, Policies Nos. 1 and 2 are incontestable as to such statements.

While we have been unable to find any authorities on the question of the incontestable clause beginning to operate anew as to supplemental and amending applications, we submit that the authorities which hold that the incontestable clause begins to operate anew as to statements in an application for reinstatement are applicable by analogy and logic. Typical of this is the leading case of *New York Life Ins. Co.* v. *Seymour,* 45 F. (2d) 47 (C. C. A. 6), Annotated, in 73 A. L. R. 1523, and the cases cited in such annotation.

The Pennsylvania courts have uniformly held that the defense of fraudulent representations is precluded by the expiration of the contestable period.

Lawler v. *Home Life Ins. Co.*, 59 Pa. Super. 409;
Brady v. *Prudential Ins. Co.*, 168 Pa. 645;
Feierman v. *Eureka Life Ins. Co.*, 279 Pa. 507;
Cohen v. *Metropolitan Life Ins. Co.*, 112 Pa. Super. 314;
Gorski v. *Metropolitan Life Ins. Co.*, 88 Pa. Super. 326.

The Federal courts have followed the same rule.

Great Western Life Ins. Co. v. *Snavely*, 206 Fed. (C. C. A. 9th Cir.) 20;
Arnold v. *Equitable Life Assur. Soc.*, 228 Fed. 157;
Dakota Life Ins. Co. v. *Midland Nat. Bank*, 18 F. (2d) 903;
Northwestern Mutual Life Ins. Co. v. *Pickering*, 293 Fed. (C. C. A. 6th Cir.) 496;
Hurt v. *New York Life Ins. Co.*, 51 F. (2d) (C. C. A. 10th Cir.) 936; affirmed on rehearing 53 F. (2d) 450, certiorari denied, 285 U. S. 541.

We submit that Policies Nos. 1 and 2 being incontestable and the defense of fraudulent representations being thereby precluded, the holding of the Circuit Court that the defense of fraud was reserved is untenable. Even if this reservation is effective, although not attached to Policies Nos. 1 and 2, it is subject to the incontestable clause contained in such policies and is rendered inoperative by the expiration of the time provided in such clauses.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected, that the questions raised are questions of law

and your petitioners should not be compelled to further protract the litigation by a trial, wherein the same questions of law would be raised, solely for the purpose of securing a final decree, and that the judgment of the United States Circuit Court of Appeals for the Third Circuit should be reversed in order that justice may be done to petitioner; and that to such end a writ of certiorari should be granted to review the decision of the Circuit Court and reverse the same and dismiss the amended bill of complaint.

Respectfully submitted,

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GEO. ROSS HULL,
CARL B. SHELLEY,
Counsel for Petitioners.

APPENDIX.

(Opinion of the United States Circuit Court of Appeals for the Third Circuit, Handed Down on the Same Day as the Opinion in the Stroehmann Case and Relied Upon by the Circuit Court in Its Disposition of the Stroehmann Case (R. 179)).

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

OCTOBER TERM, 1935.

No. 5938.

THERESA M. GATTI, in Her Own Right and as Guardian of the Estate of Yolanda J. Gatti, *Respondent-Appellant*,

v.

NEW YORK LIFE INSURANCE COMPANY, *Complainant-Appellee.*

OCTOBER TERM, 1935.

No. 5939.

JOHN G. RUHLIN, JENNIE B. RUHLIN, JOHN B. RUHLIN, WILLIAM R. RUHLIN and JEAN L. RUHLIN, *Respondents-Appellants*,

v.

NEW YORK LIFE INSURANCE COMPANY, *Complainant-Appellee.*

Appeals from the District Court of the United States for the Western District of Pennsylvania.

OPINION.

(Filed October 6, 1936.)

Before Davis and Thompson, Circuit Judges, and Watson, District Judge.

DAVIS, *Circuit Judge:*

Both cases in these appeals from the District Court involve identical questions of law.

On September 9, 1935, the New York Life Insurance Com-

pany insured the life of Yolanda J. Gatti, a citizen of Pennsylvania, for $5,000. In addition to insuring the life of Gatti, the policy contained a clause granting certain benefits in the event she became totally disabled.

She later suffered from dementia praecox, or a manic depressive psychosis, and applied for the benefits under the total disability clause. The Insurance Company paid $1,850 thereunder to the insured, or her guardian, Theresa Gatti. On November 20, 1934, after some investigation, it notified her and Theresa Gatti, that it had elected to rescind those parts of the contract of insurance which covered benefits for total disability and double indemnity, alleging that the insured had made certain false and fraudulent misrepresentations in the application for the insurance, and tendered the amount of the premiums paid under those clauses. They refused the tender and instituted proceedings against the Insurance Company to collect further payments, which they claimed to be due, of the total disability benefits, in the Common Pleas Court of Jefferson County, Pennsylvania.

On December 1, 1928, the Insurance Company issued two like policies of insurance on the life of John G. Ruhlin, a citizen of Pennsylvania, one policy for $10,000, and the second for $5,000. On July 7, 1930, it issued three more similar policies on the life of Ruhlin, each for the face value of $4,000. All of these policies contained clauses granting total disability and double indemnity benefits. On November 1, 1934, Ruhlin presented a claim for benefits for total disability. The Insurance Company refused this application, notified him that it had elected to rescind the policies in so far as they granted disability and double indemnity benefits on the ground of fraud, and tendered the amount of the premiums up to that time paid. The appellant refused the tender and also instituted suit in the Common Pleas Court of Jefferson County, Pennsylvania, to collect the benefits which he claimed to be due him under the policy.

On January 9, 1935, the Insurance Company filed a bill of complaint against Yolanda and Theresa Gatti, and on February 14, 1935 it filed a similar bill against John G. Ruhlin and the beneficiaries named in the policies. The bills contain several questions and answers made in the medical examination in connection with the applications for

insurance; allege these answers to be false and fraudulent; set forth certain allegations of fact indicating wherein the answers were false and fraudulent; pray that the provisions in the policies relating to total disability and double indemnity benefits be rescinded; and that the defendants be enjoined from instituting or prosecuting any action under these provisions.

The District Court entered decrees granting preliminary injunctions and from these decrees the defendants appealed.

All the policies involved contain the following "incontestability" clause:

> "This policy shall be incontestable after two years from its date of issue except for the non-payment of premiums, and except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

The first question raised by these appeals is whether or not the Insurance Company has the right, after expiration of two years from the date of the policies, to rescind the provision for double indemnity and disability benefits because of fraud practiced in procuring the insurance.

This question has never to our knowledge been decided by the United States Supreme Court, and the state and federal courts which have passed upon it are not in accord.

The United States Circuit Court of Appeals for the Fifth Circuit in the case of Pyramid Life Insurance Co. *v.* Selkirk, 80 Fed. (2d) 553, held that the insurer had the right to rescind for fraud the provisions relating to disability and double indemnity benefits in a contract of insurance containing an incontestability clause substantially the same as the one in the case at bar.

The United States District Court for the Western District of Pennsylvania in the case of New York Life Insurance Company *v.* Davis, 5 Fed. Sup. 516 reached the same conclusion. So have the state courts in the states of New York, Connecticut, Pennsylvania, Maryland, Mississippi, Arizona, Washington and Tennessee.

We are concerned here with the "provisions and conditions" relating to disability. Leaving out the parts not material here, the excepting clause reads: "This policy

shall be incontestable after two years from its date of issue * * * except as to provisions and conditions relating to disability benefits". It was clearly the purpose of the Insurance Company to except the provisions creating the obligation to pay these benefits from the incontestable provisions obligating it to pay insurance on the life of the insured. The policy clearly sets out the provisions and conditions relating to disability benefits and in definite and comprehensive language the excepting clause excludes these from the incontestability provisions.

But the United States Circuit Court of Appeals for the Fourth Circuit in the cases of Ness *v.* Mutual Life Insurance Company of New York, 70 Fed. (2d) 59, and New York Life Insurance Company *v.* Truesdale, 79 Fed. (2d) 481, and the Circuit Court of Appeals for the Ninth Circuit in the cases of Mutual Life Insurance Co. of New York *v.* Markowitz, 78 Fed. (2d) 396, and New York Life Insurance Company *v.* Kaufman, 78 Fed. (2d) 398, together with one or two state courts have reached a contrary conclusion. They hold that the exception in the incontestability clause applies to the *"provisions and conditions"* relating to disability and double indemnity benefits and not to the benefits themselves. For this reason, they say, the insurance company may not defend against a claim for disability benefits on the ground of fraud practiced in the procurement of the insurance if the period of limitation has expired.

We think this construction is untenable for two reasons: 1. The company may always, without an exception in the incontestability clause, contest the question as to whether or not a particular claim is covered by the policy. The question is purely one of coverage. That is, whether or not the insured has complied with the particular provisions or conditions entitling him to benefits. Metropolitan Life Assurance Co. *v.* Conway, 252 N. Y. 449; Smith *v.* Equitable Life Assurance Society, 89 S. W. (2d) (Tenn.) 165. 2. The exception here does not intend to distinguish between the "provisions and conditions" relating to benefits and the benefits themselves. These terms, "provisions and conditions", are comprehensive of the subject to which they relate. Smith *v.* Equitable Life Assurance Society, *supra.*

The expression "provisions and conditions relating to disability benefits" even if tautological, embraces all matters relating to liability for such benefits. When these terms are combined nothing else relating to liability for disability benefits remains for consideration. Both are excepted from the operation of the incontestability clause. Pyramid Life Insurance Co. *v.* Selkirk, *supra*. The language is clear and definite and the parties perfectly well understood it or with ordinary intelligence should have understood it. The exception is stated in such language as not to permit a person deliberately to misrepresent the facts and practice fraud on the company for his personal advantage and then hide behind a refined construction of the language employed.

* * * * * * *

(NOTE.—The remaining portion of the Opinion is devoted to the question of whether or not the District Court erred in enjoining the prosecution of the actions for disability benefits in the State Court and not being applicable to the questions raised in this petition, is not printed here, in the interest of brevity).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN AND LYCOMING TRUST COMPANY, TRUSTEE,

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

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Texts:

Cooley's Briefs on Insurance (2d Edition):
Vol. 5, page 4501 12
Vol. 5, page 4503 13
Couch Cyclopedia of Insurance Law:
Volume 1, page 402 44
Volume 8, page 6960 12
Vance on Insurance (2d Edition), Hornbrook Series page 821 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 599

CARL F. STROEHMANN AND LYCOMING TRUST COMPANY, TRUSTEE,

Petitioners,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS.

This case comes to this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit which was granted in limited form by this Court on February 1, 1937. The writ is limited to a consideration of whether the incontestable clause of life policy No. 4,-361,192, issued by respondent to Carl F. Stroehmann, precludes a contest of the disability benefits provided for therein on the ground of alleged fraudulent statements in the application for said policy.